Maplelee Property Sdn Bhd v Tan Lei Fon

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–302 OF 2001
MOKHTAR SIDIN, ABDUL AZIZ JJCA AND JAMES FOONG J
11 DECEMBER 2004

Contract — Guarantee — Contract of guarantee — Variation without surety's consent — Whether there was variation — Whether invoice can be in any form — Whether alteration unsubstantial and to benefit of sureties — Contracts Act 1950 s 86

Contract — Damages — Contract of guarantee — Whether question of mitigation must be taken into account

The plaintiff ('appellant'), at the material time, managed a service apartment known as 'Maple Suite'. Desirous of having a food outlet in the service apartment, the first defendant was engaged by the plaintiff to open a coffeehouse cum restaurant there. The second defendant and the third defendant ('respondent') were directors of the first defendant. To assist the first defendant financially in this project, the plaintiff lent to the first defendant a sum of RM6700 to be repaid by installments. To evidence this loan, an agreement ('Loan Agreement') was executed by the parties on the 22 April 1997. Signing for and on behalf of the first defendant were the second and third defendants, describing themselves as directors. Clause 1.2 declares: 'It is hereby agreed the loan shall be drawdown against production of valid invoices and progress certifications by the borrower in respect of works, services, supplies and equipment related directly to the restaurant premises and which are deemed acceptable to and/or approved by the lender at the lender's sole discretion'. As security for this loan, the second and third defendants in a deed of guarantee (Deed of Guarantee) dated 22 April 1997. The first defendant was unable to repay the loan. Thereupon the plaintiff repossessed the said food outlet and issued letters of demand to the defendants for the repayment of the loan. When this drew no response from the defendants, this claim was filed. The trial proceeded against the third defendant only as the plaintiff obtained default judgment against the first and second defendant. The third defendant elected to adduce no evidence. He just submitted no case to answer. The learned High Court judge dismissed the plaintiff's case against the third defendant on two main grounds: (1) there was variation to the terms and conditions of the Loan Agreement in respect of draw downs (letters of request were used and not valid invoices as required in the loan agreement) and the third defendant has no knowledge of this, nor did he approved of it; and (2) since the plaintiff has taken possession of the food outlet from the first defendant in consequence to the default in repayment of the loan, the plaintiff has enjoyed the benefits of the equipment belonging to the first defendant. The plaintiff did not take such benefits into consideration. Hence this appeal.

Held, allowing the appellant's appeal with costs:

(1) (per **Abdul Aziz JCA** and **Mokhtar Sidin JCA** concurring) Being a reservation of right, and as its sole purpose was to satisfy the appellants that the money was needed, and would therefore be used, for the proper purpose, it was within the discretion of the appellants to dispense with proof if they could be satisfied of the genuineness of a request for a drawdown without it. Clause 1.2 must therefore be construed, not strictly, but as a discretionary clause that bore within it the implication that the appellants might dispense with proof of the purpose of a drawdown if they were satisfied as to the purpose without it, so that a drawdown with no invoice or progress certification would not be a variance of the clause since it would still fall within the scope of the intention of the clause (see para 15).

(2) (per **Abdul Aziz JCA** and **Mokhtar Sidin JCA** concurring) Disbursement of the loan without invoices or progress certifications was not a variance of cl 1.2 but was within the intention of the parties as expressed in cl 1.2. Although the plaintiff's witness replied in the affirmative to the question or suggestion in cross-examination: 'In so drawing down the plaintiff changed the terms of cl 1.2', he was speaking literally as a matter of fact and not considering the legal import of the 'change' in the context of the intention of cl 1.2 (see para 17).

(3) (per **Abdul Aziz JCA** and **Mokhtar Sidin JCA** concurring) Even if the court is wrong in holding that there was no variance of cl 1.2, the court in any case of the opinion that the variance was unsubstantial and one which could not be prejudicial to the respondent as surety and therefore did not discharge the respondent as surety (see para 18).

(4) (per **Abdul Aziz JCA** and **Mokhtar Sidin JCA** concurring) Since the appellants' cause of action against the respondent was under the guarantee related to the loan agreement, the appellants were not bound to account to the respondent for whatever benefit they may have derived from the taking of possession of the restaurant premises and the equipment therein (see para 23).

(5) (per **Abdul Aziz JCA** and **Mokhtar Sidin JCA** concurring) If at all the appellants were liable to compensate or to account to anybody for the taking of possession, it is the borrower, and the borrower must sue the appellants on some cause of action not related to the loan agreement. Even if the borrower were to sue, it would not affect the appellants' entitlement to judgment on their claim under the loan agreement or under the guarantee (see para 23).

(6) (per **James Foong J** and **Mokhtar Sidin JCA** concurring) Though these letters may not be invoices which are commonly noticed in the commercial market, but they have all the characteristics of invoices which

A are: 'lists of goods shipped or send, or services rendered, with prices and charges; a bill' — see Oxford Concise Dictionary. As can be observed from a typical letter of request of 26 April 1997, the goods and services provided or to be provided with prices and or charges attached for the project are itemised. Such contents, going by the definition of the word as B defined, are sufficient qualify this document and all others with similar particulars as invoices within the meaning of cl 1.2 of the Loan Agreement which is merely to give particulars of all goods or services provided or to be provided with prices for the project (see para 50).

C (7) (per **James Foong J** and **Mokhtar Sidin JCA** concurring) The trial judge has erred in his conclusion that there has been a variation to the loan agreement. Consequently, by this, the issue of whether the third defendant was aware of or consulted over such variation becomes academic (see para 52).

D (8) (per **James Foong J** and **Mokhtar Sidin JCA** concurring) The third defendant is sued as a guarantor and not as a principal debtor. As a guarantor, the third defendant is liable under the Deed of Guarantee when the first defendant 'does not make such payment' towards the repayment of the loan. This is spelled out in cl 2(b) of the Deed of E Guarantee. In such capacity there is no question of mitigation of damages. The guarantor pays the amount specified under the guarantee when the principal debtor defaults. In this case it is a sum of RM670, 000 (see para 54).

[**Bahasa Malaysia summary**

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Plaintif ('perayu'), pada setiap masa matan, menguruskan sebuah apartmen yang mempunyai perkhidmatan dikenali sebagai 'Maple Suite'. Berhasrat untuk mempunyai kedai makan di apartmen tersebut, defendan pertama telah dilantik oleh plaintif untuk membuka kedai kopi yang juga restoran di situ. Defendan kedua dan defendan ketiga ('responden') merupakan pengarah-G pengarah defendan pertama. Bagi membantu defendan pertama dari segi kewangan dalam projek ini, plaintif meminjamkan kepada defendan pertama wang sejumlah RM670,000 yang perlu dibayar balik secara ansuran. Bagi membuktikan pinjaman ini, satu perjanjian ('perjanjian pinjaman') telah disempurnakan oleh pihak-pihak pada 22 April 1997. Penandatanganan bagi H dan untuk pihak defendan pertama adalah defendan-defendan kedua dan ketiga, yang memperkenalkan diri mereka sebagai pengarah-pengarah. Fasal 1.2 menyatakan: '*It is hereby agreed the loan shall be drawdown against production of valid invoices and progress certifications by the Borrower in respect of works, services, supplies and equipment related directly to the restaurant premises and which are deemed acceptable to* I *and/or approved by the lender at the lender's sole discretion'*. Sebagai jaminan untuk pinjaman ini, defendan-defendan kedua dan ketiga membuat satu surat ikatan jaminan bertarikh 22 April 1997. Defendan pertama gagal membuat bayaran

balik pinjaman tersebut. Oleh itu, plaintif mendapat milikan kembali kedai makan tersebut dan mengeluarkan surat tuntutan kepada defendan-defendan untuk pembayaran balik pinjaman tersebut. Disebabkan tiada maklum balas daripada defendan-defendan, tuntutan ini difailkan. Perbicaraan dimulakan terhadap defendan ketiga sahaja kerana plaintif memperoleh penghakiman ingkar terhadap defendan pertama dan kedua. Defendan ketiga memilih untuk tidak memberikan keterangan. Beliau hanya berhujah tiada kes untuk dijawab. Hakim Mahkamah Tinggi telah menolak kes plaintif terhadap defendan ketiga atas dua alasan: (1) terdapat perubahan kepada terma-terma dan syarat-syarat perjanjian pinjaman berkaitan pemberian pinjaman (surat permohonan digunakan dan bukan invois sah seperti yang dikehendaki dalam perjanjian pinjaman) dan defendan ketiga tiada pengetahuan tentang ini, mahupun bersetuju mengenainya; dan (2) memandangkan plaintif telah mengambil milikan kedai makan tersebut daripada defendan pertama berikutan kegagalan dalam pembayaran balik pinjaman tersebut, plaintif menikmati kelebihan peralatan yang dimiliki oleh defendan pertama. Plaintif tidak mengambil kira kelebihan tersebut. Oleh itu, rayuan ini dibuat.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) (oleh **Abdul Aziz HMR** dan **Mokhtar Sidin HMR** bersetuju) Memandangkan ia satu hak yang dirizabkan, dan memandangkan satu-satu tujuannya adalah untuk memuaskan perayu-perayu bahawa wang diperlukan, dan akan digunakan, bagi tujuan yang betul, ia berdasarkan budi bicara perayu-perayu untuk mengemukakan bukti jika mereka berpuas hati dengan keikhlasan permohonan untuk memberikan pinjaman wang tanpanya. Fasal 1.2 hendaklah ditafsirkan, tidak secara ketat, tetapi sebagai satu fasal berdasarkan budi bicara yang membawa implikasi bahawa perayu-perayu boleh dengan mengemukakan bukti bagi tujuan pelepasan wang jika mereka berpuas hati bagi tujuan tersebut jika tiadanya, agar pelepasan wang tanpa invois atau sijil pelaksanaan bukan satu perubahan kepada fasal tersebut memandangkan ia masih terangkum dalam skop yang diniatkan dalam fasal tersebut (lihat perenggan 15).

(2) (oleh **Abdul Aziz HMR** dan **Mokhtar Sidin HMR** bersetuju) Wang pendahuluan pinjaman tersebut tanpa invois-invois atau sijil-sijil pelaksanaan bukan satu perubahan kepada fasal 1.2 tetapi merupakan hasrat pihak-pihak seperti mana yang dinyatakan dalam fasal 1.2. Meskipun saksi-saksi plaintif menjawab secara positif terhadap soalan atau cadangan dalam pemeriksaan balas: '*In so drawing down the plaintiff changed the terms of cl 1.2*', beliau bercakap secara harfiah berdasarkan fakta tanpa mengambil kira kesannya daripada segi undang-undang perkataan '*change*' dalam konteks yang diniatkan dalam fasal 1.2 (lihat perenggan 17).

(3) (oleh **Abdul Aziz HMR** dan **Mokhtar Sidin HMR** bersetuju) Jikapun mahkamah terkhilaf membuat keputusan bahawa tidak terdapat perubahan

kepada fasal 1.2, mahkamah dalam apa-apa keadaan membuat pendapat bahawa perubahan tersebut tidak substantial dan suatu yang tidak memperjudiskan responden sebagai penjamin dan oleh itu tidak melepaskan responden sebagai penjamin (lihat perenggan 18).

(4) (oleh **Abdul Aziz HMR** dan **Mokhtar Sidin HMR** bersetuju) Memandangkan kausa tindakan perayu-perayu terhadap responden dibawah jaminan berkaitan dengan perjanjian pinjaman tersebut, perayu-perayu tidak terikat untuk menanggung apa-apa faedah yang mungkin responden terkilan akibat daripada pengambilan milikan premis restoran dan peralatan tersebut (lihat perenggan 23).

(5) (oleh **Abdul Aziz HMR** dan **Mokhtar Sidin HMR** bersetuju) Jikapun perayu-perayu bertanggungjawab untuk memberi pampasan atau menanggung rugi sesiapa kerana mengambil milikan, ia adalah peminjam, dan peminjam harus menyaman perayu-perayu atas suatu kausa tindakan yang tidak berkaitan dengan perjanjian pinjaman. Jikapun peminjam menyaman, ia tidak akan menjejaskan hak perayu-perayu kepada penghakiman keatas tuntutan mereka di bawah perjanjian pinjaman atau jaminan tersebut (lihat perenggan 23).

(6) (oleh **James Foong H** dan **Mokhtar Sidin HMR** bersetuju) Walaupun surat-surat tersebut bukan merupakan invois-invois yang biasanya dikenali di pasaran komersial, ia mempunyai kesemua ciri-ciri invois-invois iaitu: '*lists of goods shipped or send, or services rendered, with prices and charges; a bill*' — lihat Oxford Concise Dictionary. Seperti yang boleh dilihat daripada surat permohonan biasa bertarikh 26 April 1997, barangan dan perkhidmatan yang disediakan atau akan disediakan berserta harga dan/atau caj dilampirkan untuk projek tersebut yang dibutirkan. Kandungan tersebut, berdasarkan perkataan-perkataan yang ditafsirkan, adalah mencukupi untuk melayakkan dokumen ini dan butiran lain yang sama seperti dalam invois-invois dalam maksud fasal 1.2 perjanjian pinjaman yang hanya memberikan butiran semua barangan atau perkhidmatan yang disediakan atau akan disediakan berserta harga untuk projek tersebut (lihat perenggan 50).

(7) (oleh **James Foong H** dan **Mokhtar Sidin HMR** bersetuju) Hakim perbicaraan terkhilaf dalam keputusannya yang menyatakan terdapat perubahan kepada perjanjian pinjaman tersebut. Oleh itu, isu sama ada defendan ketiga sedar atau mendapat nasihat tentang perubahan tersebut menjadi suatu yang akademik (lihat perenggan 52).

(8) (oleh **James Foong H** dan **Mokhtar Sidin HMR** bersetuju) Defendan ketiga disaman sebagai penjamin dan bukan sebagai penghutang utama. Sebagai penjamin, defendan ketiga bertanggungjawab di bawah suratikatan jaminan apabila defendan pertama '*does not make such payment*' terhadap pembayaran balik pinjaman tersebut. Ini dinyatakan dalam fasal 2(b) suratikatan jaminan. Dalam kapasiti sebegini, tiada persoalan mitigasi

ganti rugi. Penjamin membayar jumlah yang ditetapkan di bawah jaminan tersebut jika penghutang utama gagal membuat pembayaran. Dalam kes ini ia berjumlah RM670,000 (lihat perenggan 54)].

Notes

For cases on damages generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2833–3012.

For cases on guarantee generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3345–3588.

Cases referred to

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29 (refd)

Holme v Brunskill [1878] 3 QBD 498 (refd)

Kidurong Land Sdn & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485 (refd)

National Bank of Nigeria Ltd v Awolesi [1964] 1 WLR 1311 (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (refd)

Legislation referred to

Contracts Act 1965 ss 86, 92, 93, 94, 98

Appeal from: Code No S2–22–172 of 1998 (S8) (High Court, Kuala Lumpur)

Manpal Singh (TPrem Anand with him) (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the appellants.

Mathew Thomas Philip (Thomas Philip Kwa & Lou) for the respondent.

Mokhtar Sidin JCA:

[1] I have been given the opportunity of reading the draft judgments of my learned brothers, Abdul Aziz Mohamad, JCA and James Foong Cheng Yuen J whereupon both of them have decided to allow the appeal and judgment be entered for the appellants as prayed. I have nothing more to add to what have been expressed by my learned brothers in their respective judgments.

[2] The appeal is hereby allowed and that judgment be entered for the appellants as prayed. Costs to the appellants here and in the court below. The deposit is to be refunded to the appellants.

Abdul Aziz JCA:

[3] This is an appeal against the dismissal by the High Court of the appellant company's claim against the respondent for the refund of a sum of RM670,000 lent by the appellants to a company called Inspiration Hub Sdn Bhd ('the borrower') pursuant to a loan agreement dated 22 April 1997 between the appellants and the borrower. It was an interest-free unsecured loan. The respondent and another person, who were the only directors and shareholders of the borrower, guaranteed the loan under a joint-guarantee of the same date. In the High Court the appellants' action was against the borrower under the loan agreement and against the two guarantors under the guarantee. The trial proceeded against the respondent only because the appellants had obtained default judgment against the borrower and the other guarantor.

[4] At the trial, no evidence was adduced by the respondent because after the appellants closed their case with only one witness, the respondent's counsel submitted that there was no case to answer and elected not to bring in evidence. Two grounds were advanced, with which the judge agreed. He therefore dismissed the claim. I shall state and deal with those grounds after setting out further facts.

[5] According to the appellants' sole witness, the appellants were the managers of a block of service apartments called Maple Suite owned by Lim Seng Company Sdn Bhd and it was necessary, as a requirement of Dewan Bandaraya Kuala Lumpur, for the service apartments to have a coffee house-cum-restaurant for them to be called service apartments. The recital to the loan agreement stated the facts that on the same date, 22 April 1997, the appellants and the borrower had executed a tenancy agreement whereby the appellants as landlord let to the borrower as tenant restaurant premises in Maple Suite and that upon the request of the borrower the appellants had agreed to grant an interest-free loan of RM670,000 to the borrower 'to assist the borrower to pre-open, equip, furnish and fit out the restaurant premises'. The fact of the tenancy was merely information related to the purpose of the loan and was of no legal significance to the loan agreement, and there was nothing elsewhere in the loan agreement to show any bearing that rights and liabilities under the tenancy agreement, on the one hand, and those under the loan agreement, on the other hand, might have on one another.

[6] Clause 1.2 of the loan agreement provided as follows:

> It is hereby agreed that the loan shall be drawdown *(sic)* against production of valid invoices and progress certifications by the borrower in respect of works, services, supplies and equipment related directly to the restaurant premises and which are deemed acceptable to and/or approved by the lender at the lender's sole discretion.

[7] The loan was disbursed at different times in different amounts and was fully disbursed on 9 August 1997. Each disbursement was made upon request by letter from the borrower stating what they needed the particular sum for,

but no invoices or progress certifications were produced in support of any of the sums requested. No question, however, arose in the trial that the sum of RM670,000 or any part of it was not used for the purpose stated in the loan agreement. The plaintiffs' witness said that in each case there was no reason to doubt the request.

[8] According to cl 3.1 of the loan agreement, the repayment was to be by monthly installments, each of RM22,333, the first installment to be six months from the date of the agreement, that is, on 22 October 1997. But the borrower failed to pay.

[9] Now in or about January 1998 the appellants took back possession of the restaurant premises and the equipment in them. This fact only emerged in the cross-examination of the appellants' witness. The appellants' claim against the respondent being under the guarantee related to the loan agreement, there was no reason for them to introduce evidence about the taking of possession of the restaurant premises. It was not part of their case. So what is in evidence about the taking of possession is only so much as the witness was cross-examined about it. And this is as much as was elicited from him:

> The plaintiff had taken possession of the restaurant and equipment. All the set up was done by (the borrower). The restaurant was taken roughly January 1998. The plaintiff is running the restaurant now. I was present when possession was taken back. The premises were not sealed when taken back. The taken *(sic)* back was done after we lodge *(sic)* a police report and together with lawyer and director we went to the place.
>
> There was inventory prepared. It is not in the document.

[10] It is therefore not in evidence on what grounds was possession of the restaurant premises taken back.

[11] By 22 January 1998 the borrower had been in default under the loan agreement in four installments totaling RM89,332. The borrower failing to settle the sum after notice, the appellants demanded of them and the guarantors repayment of the entire loan and subsequently commenced the action against them.

[12] The first ground for the judge's dismissal of the appellants' claim was based on s 86 of the Contracts Act 1950, which provides as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

[13] The judge found that the disbursement of the loan sum without the production of invoices and progress certifications was a variance of cl 1.2 of the loan agreement and that the variance was without the respondent's consent.

[14] In the High Court the appellants' counsel had submitted, first and foremost, that there was no variance of cl 1.2. His argument for so contending is not clear from the notes of proceedings. In their written submission for this appeal the appellants did not contend that there was no variance but argued, first and foremost, that the variance was unsubstantial and insignificant and did not in any way prejudice the respondent. In his oral submission, however, the appellants' counsel submitted, *inter alia,* that there was no variance and his reason for so contending, as far as I have been able to make it out, was that the loan agreement did not provide a specific format for a request for disbursement or drawdown, a reason which I do not find satisfactory.

[15] Whether a drawdown without invoices or progress certifications was a variance of cl 1.2 depends on the intention and effect of the clause, the intention being that of the parties, the borrower and the appellants. The clause speaks of 'production of valid invoices and progress certifications by the borrower'. The phrase 'by the borrower' to my mind does not qualify 'progress certifications'. It qualifies 'production'. So that another way of reading the entire phrase would be: 'production by the borrower of valid invoices and progress certifications'. The purpose of the invoices and progress certifications was obviously to satisfy the appellants that the money disbursed would be used for the purpose for which the loan had been agreed to be given. The invoices and progress certifications were meant to serve as independent proof of that and therefore it could not be that the progress certifications were to be made by the borrower themselves. Having said that, however, it is necessary to observe that cl 1.2 is not worded in such a way as to prohibit the appellants from allowing a drawdown without such proof. It is not worded as a stipulation by the borrower, accepted by the appellants that the appellants were not to allow a drawdown without such proof. There was no reason for the borrower to make such a stipulation. The borrower would have been too happy if the appellants accepted their mere word for it that they needed a particular sum for the purpose specified in the loan agreement. It was a stipulation by the appellants, accepted by the borrower, that they would require such proof before they would disburse the loan. It was a reservation of a right by the appellants, acceptable to the borrower, not to disburse without such proof, the purpose of which was solely to satisfy the appellants that the money would be spent for the stated purpose. It is not difficult to imagine that the appellants had an interest to be so satisfied. They had an interest in having a restaurant to serve the service apartments. Further, proper use of the money was more likely to bring in profit and to enable the borrower to repay the loan than if the money was used for some other purpose. Being a reservation of right and as its sole purpose was to satisfy the appellants that the money was needed, and would therefore be used, for the proper purpose, it was within the discretion of the appellants to dispense with proof if they could be satisfied of the genuineness of a request for a drawdown without it. Clause 1.2 must therefore be construed, not strictly, but as a discretionary clause that bore

within it the implication that the appellants might dispense with proof of the purpose of a drawdown if they were satisfied as to the purpose without it, so that a drawdown with no invoice or progress certification would not be a variance of the clause since it would still fall within the scope of the intention of the clause.

[16] There are two other considerations that support my view that cl 1.2 was not meant to be complied with strictly but was a matter to be left to the discretion of the appellants. One consideration is that invoices and progress certifications do not appear to be possible for some of the kinds of expenses for which drawdown would be needed. Take, for example, the borrower's first request by their letter dated 26 April 1997 for a total sum of RM160,270. The total comprised eight items. One of them was RM60,000 for the mobilisation of a foreign pre-opening team. The borrower needed the money for that. Another item was RM54,800 for a rental deposit according to a tenancy agreement. The borrower needed that sum to pay the rental deposit. I cannot see how an invoice or progress certification could be obtained for those needed expenses. Further, as regards the rental deposit, if the tenancy agreement was the tenancy agreement between the appellants and the borrower that I have mentioned, the appellants would themselves know without it having to be proved that the borrower needed that sum for the rental deposit. The other consideration applies only if I am wrong in saying earlier that the phrase 'by the borrower' does not qualify 'progress certifications' and if the correct reading is that it does, so that progress certifications were to be those made by the borrower. Since progress certifications by the borrower would amount to the word of the borrower themselves, then as far as progress certifications were concerned, the word of the borrower alone would suffice for such items as were capable of progress certification. There was no reason why the word of the borrower alone might not suffice for other items.

[17] For those reasons I am of opinion that disbursement of the loan without invoices or progress certifications was not a variance of cl 1.2 but was within the intention of the parties as expressed in cl 1.2. Although the plaintiff's witness replied in the affirmative to the question or suggestion in cross-examination: 'In so drawing down the plaintiff changed the terms of cl 1.2', he was speaking literally as a matter of fact and not considering the legal import of the 'change' in the context of the intention of cl 1.2.

[18] If I am wrong in holding that there was no variance of cl 1.2, I am in any case of opinion that the variance was unsubstantial and one which could not be prejudicial to the respondent as surety and therefore did not discharge the respondent as surety. The authority for this is the following passage from *Holme v Brunskill* [1878] 3 QBD 498 at p 505 which was applied by the Privy Council in *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311 and which the Federal Court relied on in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration ... but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

[19] The variance was, in my opinion, unsubstantial because the only purpose of the requirement of invoices and progress certifications was to satisfy the appellants that the drawdown was for the purpose of the restaurant premises, and it was open to the appellants to be so satisfied on the mere say-so of the borrower and without the invoices and progress certifications. The variance was in my opinion not prejudicial to the respondent as guarantor because the result would have been the same if there had been invoices and progress certifications. The loan would have been disbursed and the money spent on the restaurant premises, as it in fact was. There has been no suggestion that any sum disbursed was not in fact required for the restaurant premises or was used other than for the restaurant premises.

[20] But even if there was a variance of cl 1.2 and it was neither unsubstantial nor unprejudicial to the respondent, cl 3(2)(vi) of the letter of guarantee operates to prevent the respondent from being discharged as guarantor or surety. The clause provides as follows:

> (2) As between the guarantors and you — that is the appellants — each of the guarantors shall be liable under this cl 3 as if he were a principal debtor and not merely a surety and accordingly the guarantors shall not be discharged, nor shall their liability be affected, by anything which would not discharge them or affect their liability if they were principal debtors, including, without limitation …

and there follows a series of nine paragraphs, one of which is:

> (vi) any amendment to ... the agreement;.

[21] By that clause the respondent in effect agreed to be liable as a principal debtor would be liable. As far as liability was concerned, she agreed to be treated as a principal debtor. What would not discharge, or affect the liability of a principal debtor would therefore — note the words 'and accordingly' — not discharge the respondent or affect her liability as a guarantor. The variance in this case would not discharge, or affect the liability of, the principal debtor, that is the borrower. So it would not discharge the respondent, or affect her liability under the guarantee. The clause thus far is already enough to preserve the respondent's liability. The nine paragraphs merely set out specific things that would not discharge, or affect the liability of, the guarantors if they were

principal debtors. They are not exhaustive. Note the words 'including' and 'without limitation'. They do not restrict the scope of the basic and general provision of sub cl (2). The appellants need not have to rely on the specific instance of para (vi). But their specific reliance on para (vi) is nonetheless valid. The only argument of the respondent against the appellants' resort to para (vi) is that cl 7(1)(b) of the loan agreement provides that 'This agreement may not be ... amended in any manner except by an instrument in writing signed by the parties ...', the reasoning being that the variance of cl 1.2 of the agreement, not being done according to cl 7(1)(b), was not an amendment of the loan agreement and would not fall under cl 3(2)(vi) of the letter of guarantee. The argument is neat and attractive but I do not think that cl 3(2)(vi) of the letter of guarantee, in speaking of an 'amendment', was necessarily thinking of cl 7(1)(b) of the loan agreement. Without having to examine the difference between an amendment of a contract and a variance in the terms of a contract, I think that the word 'amendment' in cl 3(2)(vi) ought to be construed widely to include such a variance. I do not think the word was put there after a meticulous consideration of what was intended to be its scope. I think it was chosen as a convenient word to express any change in,' or departure or deviation from, the terms of the agreement.

[22] The second ground for the judge's dismissal of the appellants' claim concerned the taking of possession of the restaurant premises and the equipment therein. If I understand the respondent's counsel rightly, in submission in the High Court the issue relating to the taking of possession, which was not pleaded in the statement of defence was taken up as a point of failure of the appellants to prove their debt. No objection was taken in the High Court to the raising of this issue on the ground of its not being pleaded. In the respondent's outline of submission for the High Court at p 34 of the appeal record, the issue was reduced to the argument that because of the taking of possession the appellants had not suffered any loss and their debt had been fully satisfied. The judge ruled that the value of the equipment, which was not in evidence, ought to have been deducted from the claimed sum of RM670,000, as otherwise the appellants would get the benefit of the sum as well as the equipment. Before us the respondent's counsel argued that the appellants had gained financial advantage from the taking of possession of the restaurant and equipment and must account for it, and since they had not done so the court had been unable to determine the amount unpaid under the loan agreement.

[23] I am of opinion that, since the appellants' cause of action against the respondent was under the guarantee related to the loan agreement, the appellants were not bound to account to the respondent for whatever benefit they may have derived from the taking of possession of the restaurant premises and the equipment therein. It was not the repossession of goods under a leasing or hire-purchase agreement, which usually provides for the accounting for the goods where the owner claims the amount due under the agreement and the

appellants' claim was not under such an agreement. It was not the seizure of a security for a loan because the loan in this case was without security. It was unrelated to the loan agreement. There was no material before the judge on which to determine the rights and liabilities of the appellants and the borrower in the matter of the taking of possession. It was most probably a tenancy matter between the appellants as landlord and the borrower as tenant. If at all the appellants were liable to compensate or to account to anybody for the taking of possession, it is the borrower, and the borrower must sue the appellants on some cause of action not related to the loan agreement. Even if the borrower were to sue, it would not affect the appellants' entitlement to judgment on their claim under the loan agreement or under the guarantee. In the taking of possession's having no effect whatsoever on the appellants' claim under the loan agreement or the guarantee, the position is no different from what it would be if the restaurant premises had been rented from someone other than the appellants.

[24] In para 17 of her outline of submissions in this appeal, the respondent also argued, which she had not done in the High Court, that 'Having surreptitiously taken over the assets of the borrower, the appellant has also prejudiced the respondent's right of recourse against the assets of the borrower which rights are enshrined in ss 92, 93, 94 and 98 of the Contracts Act 1965'. In my opinion, none of those sections supports the argument.

[25] Section 92 provides:

> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

[26] Apart from any other reason, the section does not support the respondent's argument because it concerns the impairing of 'the eventual remedy of the surety himself against the principal debtor' and not the impairing of any right of recourse of the surety against the assets of the principal debtor, which is the subject of the complaint in para 17.

[27] Section 93 provides:

> Where a guaranteed debt has become due, or default of the principal debtor to perform 'a guaranteed duty has taken place, the surety – upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

[28] In order to rely on this section, the argument has to be premised on the assumption that the appellants as creditor under the loan agreement had rights against the borrower as principal debtor over the borrower's property in the restaurant premises. The appellants as creditor under the loan agreement had no such rights because the borrower's property was not charged as security and the loan agreement gave no such rights otherwise.

[29] Section 94 provides:

> A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

[30] It is not applicable because the loan was without a security.

[31] Section 98 provides:

> In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he has paid wrongfully.

[32] It itself proclaims its irrelevance to the respondent's argument.

[33] I would allow the appeal with costs and order that judgment be entered for the appellants as prayed for.

James Foong J:

INTRODUCTION

[34] This is an appeal by the plaintiff, in High Court at Kuala Lumpur civil suit No S2–22–172 of 1998, against the decision of the learned High Court judge who dismissed its claim with cost against the third defendant.

BACKGROUND

[35] The plaintiff, at the material time, managed a service apartment known as 'Maple Suite'. Desirous of having a food outlet in the service apartment, the first defendant was engaged by the plaintiff to open a coffeehouse cum restaurant there. The second and third defendants were directors of the first defendant. To assist the first defendant financially in this project, the plaintiff lent to the first defendant a sum of RM6700 to be repaid by installments. To evidence this loan, an agreement ('Loan Agreement') was executed by the parties on the 22 April 1997. Signing for and on behalf of the first defendant were the second and third defendants, describing themselves as directors.

[36] The recital of the Loan Agreement sets out the objective of the loan as:

> to assist the borrower to pre-open, equip, finish and fit out the restaurant premises upon the terms and conditions herein.

[37] The operative part of this agreement repeats the objective of the loan and then in cl 1.2 declares:

> It is hereby agreed the loan shall be drawdown against production of valid invoices and progress certifications by the borrower in respect of works, services, supplies and equipment related directly to the restaurant premises and which are deemed acceptable to and/or approved by the lender at the lender's sole discretion.

[38] As security for this loan, the second and third defendants in a deed of guarantee ('Deed of Guarantee') dated 22 April 1997 declares to the plaintiff:

> you agreed to make available to the company (first defendant) an unsecured loan for the sum of RM670,000 ... on the terms and conditions contained in the agreement ('Loan Agreement') ... we ... hereby enter into this letter of guarantee upon the following terms

[39] The loan amount was disbursed by the plaintiff to the first defendant upon the first defendant forwarding to the plaintiff, from time to time, letters requesting for drawdowns.

[40] The first defendant was unable to repay the loan. Thereupon the plaintiff repossessed the said food outlet and issued letters of demand to the defendants for the repayment of the loan. When this drew no response from the defendants, this claim was filed.

THE LEARNED JUDGE'S GROUNDS OF JUDGEMENT

[41] The learned High Court judge sets out two grounds to support his decision in dismissing the plaintiff's case against the third defendant. They are:

(1) There was variation to the terms and conditions of the Loan Agreement in respect of drawdowns and the third defendant has no knowledge of this, nor did he approve of it.

(2) Since the plaintiff has taken possession of the food outlet from the first defendant in consequence to the default in repayment of the loan, the plaintiff has enjoyed the benefits of the equipment belonging to the first defendant. The plaintiff did not take such benefits into consideration.

REMINDER

[42] Before I begin to analyse this appeal, it must be reminded that after the plaintiff closed its case the third defendant elected to adduce no evidence. He just submitted no case to answer.

ANALYSIS

First Issue: Was there a variation of the Loan Agreement, and if there was, is the third defendant exempted from the guarantee when he has neither consented to nor /informed of the variation?

[43] Section 86 of the Contracts Act provides:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

[44] Case law has established that:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self evident that the alteration is not substantial, or one which cannot be prejudicial to the surety, the court will not, in any action against the surety, go into inquiry as to the effect of the alteration...but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged' — Cotton LJ in *Holme v Brunskill* [1878] 3 QBD 498 which is followed in the Privy Council in *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311 and adopted by our Federal Court in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 and repeated in the Supreme Court decision of *Kidurong Land Sdn & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485.

[45] In *Kidurong Land Sdn & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485 the Supreme Court went further to say that:

> The onus of proving that the surety consented to the alterations of the contract is upon the party seeking to enforce the guarantee.

[46] The variation in the Loan Agreement, as claimed by the third defendant, is based on the letters of the first defendant to the plaintiff requesting for drawdowns. The third defendant insisted that these letters of request are not 'valid invoices' as are required in the Loan Agreement to be presented to the plaintiff before each drawdown could be entertained. Counsel for the third defendant even pointed out that this fact was confirmed by the plaintiffs own witness — PW1, who said in response to a question put to him in cross-examination that:

> This (one of the letters requesting for drawdowns dated 26 April 1997) is not invoice within cl 1.2 of the Loan Agreement.

[47] To ascertain whether this itself constitutes a variation in the Loan Agreement it is necessary to peruse these letters against the recital and the relevant parts of the Loan Agreement that I have highlighted in the earlier part of my judgment.

[48] First, I observed that these letters for drawdown commenced with a standard statement: 'With reference to the loan agreement... for the development and pre-opening of the F & B Outlet … the following funds are urgently required'.

[49] Then it is followed by particulars. The nature of the particulars is best reflected in the request made on 26 April 1997, which are as follows:

1	Initial Funds required for licensing	RM4,570 pre-op
2	Mobilisation Pre-opening Team (foreign)	RM60,000 pre-op
3	Rental Deposit according to tenancy agreement	RM54,800 pre-op
4	Staff Advertisement and Recruitment Drive	RM6,500 pre-op
5	Computer & printer	RM3,600 pre-op
6	Down Payment for Nino Sdn Bhd	RM250,000 Project
7	Administrative Staff	RM3,500 pre-op
8	Company Secretary	RM2,300 pre-op
	Total	RM 160,270

[50] It is my view that though these letters may not be invoices which are commonly noticed in the commercial market, but they have all the characteristics of invoices which are: 'lists of goods shipped or send, or services rendered, with prices and charges; a bill' — see Oxford Concise Dictionary. As can be observed from a typical letter of request of 26 April 1997, the goods and services provided or to be provided with prices and or charges attached for the project are itemised. Such contents, going by the definition of the word as defined, are sufficient qualify this document and all others with similar particulars as invoices within the meaning of cl 1.2 of the Loan Agreement which is merely to give particulars of all goods or services provided or to be provided with prices for the project. I agree that one often finds in a commercial transaction an invoice of a standard format with a heading 'invoice' expressly printed or written at the top with particulars of goods or services and price listed below. But such format is not a strict requirement to qualify as an invoice. So long as all the elements within the definition of this term are observed an invoice can be in any form. Likewise, in this case, it came in a form of letters of request for drawdown.

[51] Though the third defendant has seized upon the statement of the plaintiff's own witness who has uttered that the letter of request of 26 April 1997 is 'not an invoice within cl 1.2 of the Loan Agreement' as an advantage for his defence, I believe that this witness is mistaken over the true meaning of the word 'invoice'. Most probably he has in mind the stereotype of invoice that I have just mentioned. But in the circumstances of this case, and for reasons as explained the requirement of an invoice to support a request for drawdown is in the letter of request itself. The first defendant was at the material time in need of funds to quickly set up the food outlet. All that was necessary was for the plaintiff to be satisfied that such funds were actually required or expanded. This cl 1.2 was more for the satisfaction and comfort of the plaintiff. Once

satisfied that the amount was required or actually spend on the project then the plaintiff will release the loan to the first defendant of whom the third defendant was a director. Now that the loan is not repaid, the third defendant turns around to pick on an error in the plaintiff's testimony that can be explained (for such mistake) when in actual fact, such loan was actually and properly disbursed to the first defendant for the project according to the terms of the Loan Agreement. For this the court would not allow a party to take advantage of this to exempt himself from liability when all facts and circumstances dictates otherwise.

[52] With these, I find that the trial judge has erred in his conclusion that there has been a variation to the loan agreement. Consequently, by this, the issue of whether the third defendant was aware of or consulted over such variation becomes academic.

Second issue: Accounting for the benefits enjoyed by the plaintiff in taking over the restaurant.

[53] The next issue of this appeal relates to the finding of the trial judge who said: 'apabila diambil balik oleh plaintif, mereka tidak mengambil senarai alat-alat yang ada di restoran. Kepada saya nilai alat perlu ditolak kerana jika plaintif dibayar pinjaman penuh, maka plaintif bukan sahaja akan mendapat balik RM6700 tetapi juga alat-alat yang dipasang di restoran itu. (Tidak diterangkan di mahkamah tentang perbelanjaan harus yang dibayar plaintif kepada defendan pertama).' To support this, the learned judge quoted a passage from *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 which provides:

> In considering the overall position of the purchaser, the court should not wear blinkers and ignore the fact that the purchaser stands to make a substantial profit on the price increase of the land alone only because of the breach of contract, which therefore should be deducted from the loss of profits. Not to do so would be to put the purchaser in a better position that it would have been if the contract had been performed in 1988. Also, to countenance such a claim by the purchaser would amount to countenancing a claim for double recovery.

[54] I am of the view the learned judge is mistaken as to cause of action against the third defendant in this case. The third defendant is sued as a guarantor and not as a principal debtor. As a guarantor, the third defendant is liable under the Deed of Guarantee when the first defendant 'does not make such payment' towards the repayment of the loan. This is spelled out in cl 2(b) of the Deed of Guarantee. In such capacity there is no question of mitigation of damages. The guarantor pays the amount specified under the guarantee when the principal debtor defaults. In this case it is a sum of RM670,000. But if the third defendant is sued as a principal debtor then the proposition in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* may apply. Here, the legal consideration is completely different; the guarantor has to pay out the entire guaranteed sum when the principal debtor defaults.

Subsidiary issue: Sections 92, 93, 94 and 98 of the Contracts Act

[55] During argument before this court, the defendant accused the plaintiff of 'surreptitiously taken over the assets of the borrower prejudicing the third defendant's rights of recourse against the assets of the first defendant and such rights are enshrined under ss 92, 93, 94 and 98 of the Contracts Act 1965.

[56] At the outset, I wish to point out that this issue was never advanced in the court below. For this, I feel that it should not be entertained at this stage of the proceedings. For authority, the case of *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29 recently decided by this court would suffice.

[57] In any event, if considered, I find this contention without merits. The principle provision of the law relied on by the third defendant to base this argument is, in my view, s 92 of the Contracts Act. The other ss mentioned (ss 93, 94, and 98) are merely to compliment and support this provision. I feel that once principle provision is considered then the rest (of the provisions cited) would just fall into place. However for completeness, I shall spell out each of the sections relied on and then comment on them.

[58] Section 92 of the Contracts Act provides:

> If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

[59] Section 93 of the Contracts Act provides:

> Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

[60] Section 94 of the Contracts Act provides:

> A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

[61] Section 98 of the Contracts Act provides:

> In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he has paid wrongfully.

[62] Now returning to principal section (s 92 of the Contracts Act), with the requirements stated therein, I am unable to comprehend how the repossession

of the food outlet by the plaintiff is inconsistent with the rights of the third defendant, as surety, that would impair his eventual remedy against the first defendant, as a principal debtor. To consider what is inconsistent with the rights of the surety, such rights must first be established. There is no evidence adduced to elaborate on these. Neither is there evidence revealed on the intended remedy that may be instituted by the third defendant against the first defendant, as the principal debtor. Without such material evidence this accusation is baseless.

[63] Then for s 93 of the Contracts Act, it is only relevant when the surety has paid to the creditor the guaranteed sum. In this instant case, the third defendant has not settled with the plaintiff the guaranteed sum to be entitled to this right.

[64] For s 94 of the Contracts Act, from the evidence tendered, I detect no other security offered by the first defendant to the plaintiff for this loan except the guarantors, of whom the third defendant is one. When this is the only security, and upon this security the plaintiff is claiming from the third defendant, then the plaintiff cannot be guilty of losing or, without the consent of the third defendant, parted with such security to entitle the third defendant to be discharged from his obligation to pay the plaintiff.

[65] And finally for s 98 of the Contracts Act, the third defendant's right to recover from the first defendant, as principal debtor is assured by the provision of this piece of legislation. He can still proceed to recover from the first defendant, if he so desires. No one has deprived him of this right.

CONCLUSION

[66] On the grounds stated above, I am of the view that this appeal should be allowed with cost here and below.

Appeal allowed.

Reported by AG Kalidas